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January 12, 2012

The Honorable Edmund G. Brown, Jr.
Governor of California
State Capitol, Suite 1173
Sacramento, California 95814

In re: Clemency Petition of Shirley Ree Smith

Dear Governor Brown:

I am writing to formally address Shirley Ree Smith's application for clemency, which was served on my office December 15, 2011. In an effort to assist you in making a decision whether to grant said request, and if so, under what circumstances, we have fully investigated the circumstances of Ms. Smith's case, including the investigative and pretrial record surrounding her case, certain of the trial transcripts, both the state and federal court decisions pertaining to Ms. Smith, as well as Ms. Smith's prison disciplinary history. Further, we have sought and obtained expert medical opinions regarding the current state of the science that forms the foundation for Abusive Head Trauma (AHT, which was formerly colloquially referred to as Shaken Baby Syndrome (SBS)). Finally, we have researched all applicable statutory and case law associated with AHT diagnoses as they pertain to infants. Based on our thorough review of the facts of this case it is my position that if clemency is granted, it should be based on the particular circumstances attendant to Ms. Smith, not on a rejection of the well-documented and widely accepted medical diagnosis, AHT.

AHT IS WIDELY ACCEPTED BY BOTH THE MEDICAL AND LEGAL
COMMUNITIES AS A DIAGNOSIS AND CAUSE OF DEATH

According to the U.S. Department of Health and Human Services Center for Disease Control, SBS resulting in head injury is a leading cause of child abuse death in the United States.¹ A study published in the Journal of the American Medical Association in August 2003 estimated that approximately 300 children nationwide are killed each year as a result of SBS.² SBS may

¹ *A Journalists Guide to Shaken Baby Syndrome: A Preventable Tragedy*, U.S. Department of Health and Human Services Centers for Disease Control and Prevention. 2012.

² *Journal of American Medicine, A Population-Based Study of Inflicted Traumatic Brain Injury in Young Children* by Heather T. Keenan, MDCM, MPH; Desmond K. Runyan, MD, Ph.D.; Stephen W. Marshall, Ph.D.; Mary Alice Nocera, RN, MSN; David F. Merten, MD; Sara H. Sinal, MD, 2003.

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result from both shaking alone or from impact (with or without shaking).³ The accepted conclusion by the medical community that shaking infants can cause severe head trauma resulting in brain injury and death is neither new nor controversial. California courts have long accepted medical testimony regarding AHT and SBS in upholding guilty verdicts in child abuse and murder cases based on such testimony.⁴

ANY ORDER OF CLEMENCY SHOULD BE BASED ON EQUITABLE
GROUNDS, NOT THE VALIDITY OF THE SCIENCE

Notwithstanding the overwhelming acceptance by the medical community of the diagnosis of AHT as outlined above, it may remain that you wish to exercise your constitutional authority to grant clemency to Ms. Smith in the form of a commutation of her sentence. I am mindful of Ms. Smith's lack of criminal history, her age, the amount of time she has served, the absence of evidence of violent activity during her incarceration, and the nature and circumstances of the charge. If those equitable considerations underpin your determination that mercy in the form of clemency is appropriate in Ms. Smith's case, this office will decline to weigh in on such decision, as that is clearly within the purview of the Governor.

If, however, your decision whether to grant clemency to Ms. Smith is in any way predicated on the issue of the underlying science that establishes the foundation for AHT as a medically-approved finding, this office hereby requests an opportunity to be heard in order to provide you with a full and complete record of the evidence supporting this well-established and widely-accepted medical diagnosis. A decision to grant Ms. Smith clemency based upon a misunderstanding of the validity of the medical evidence presented at Smith's trial would undermine the public confidence in well-established medical diagnoses of child abuse, and it would contravene the work of myriad local and national health organizations as well as public safety officials, which have for decades been working to protect our communities from the dangers of AHT as it pertains to infants and toddlers. Granting Ms. Smith clemency based on any suggestion that there is doubt about the existence of and risks associated with AHT as it relates to infants would send a chilling message to the community that the abuse of infants is not taken seriously by our public officials.

³ *Preventing Shaken Baby Syndrome – A Guide for Health Departments and Community-Based Organizations*, U.S. Department of Health and Human Services Centers for Disease Control and Prevention. 2012.

⁴ See, e.g., *People v. Salazar* (2005) 35 Cal.4th 1031 (affirming defendant's conviction for second-degree murder of an infant left in his care where cause of death was established to be Shaken Baby Syndrome); *People v. Lewis* (2004) 20 Cal.App.4th 837 (upholding defendant's conviction for assaulting a child with force likely to produce great bodily injury resulting in the death of his son where evidence demonstrated the child's cause of death was Shaken Baby Syndrome); *People v. Albritton* (1998) 67 Cal.App.4th 647 (sustaining defendant's conviction for involuntary manslaughter and child abuse resulting in death where baby died as a result of Shaken Baby Syndrome).

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There may exist justifications for you to consider Ms. Smith's clemency application. Whether AHT is accepted as a valid medical diagnosis and cause of death should not be one of them.

Thank you for the opportunity to address this extremely important issue.

Very truly yours,

A handwritten signature in black ink, appearing to read "Steve Cooley", with a stylized flourish at the end.

STEVE COOLEY
District Attorney

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